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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/926,586	11/21/2001	Anna Berggren	216110USOPCT	7996
22850	7590	11/17/2003	EXAMINER	
OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C. 1940 DUKE STREET ALEXANDRIA, VA 22314			PRATT, HELEN F	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 11/17/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/926,586	BERGGREN ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Helen F. Pratt	1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 20 October 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-21, 24-29, 32 and 33 is/are rejected.
- 7) ☒ Claim(s) 22, 23, 30, 31 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. §§ 119 and 120**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All   b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                  | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____                                    |

### DETAILED ACTION

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Strawberry Yogurt drink and Tamine et al. (Yoghurt, page 242) and Yakult.

Strawberry Yogurt discloses a beverage containing fruit and yogurt (see recipe). Yogurt is known to contain lactobacilli. Yoghurt discloses that it is known to make beverages from Yogurt, pages 242. Yakult discloses that in 1935 a fermented milk drink containing lactic acid bacteria was developed and that the bacteria was important to a balanced intestinal microflora (first 4 paragraphs, on page 1. Claim 14 differs from the reference in that the composition is a sports drink. However, a sports drink could encompass many various compositions. It would have been obvious to add lactobacilli to any beverage for its known function of increasing the levels of good bacteria in the gut.

Claims 15 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claim 14 above, and further in view of Kurppa (WO 98/46091).

Kurppa discloses a sports drink and powder as in claim 15 which contains micronutrients such as potassium chloride and magnesium sulfate and other conventional ingredients found in a sports drink (abstract and page 5, Ex. 2). Therefore,

it would have been obvious to use known conventional ingredients in the composition of the above references.

Claims 25 and 33 are now to a method of treating various gastrointestinal disturbances. However, as the claimed sports drink has been disclosed above, the various gastrointestinal disturbances would have been alleviated as the particular composition has been shown. Therefore, it would have been obvious to alleviate various symptoms by using a lactobacilli for its known functions.

Claims 16-21, 26-29, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claims 14-15 above, and further in view of Molin (WO 89/08405).

Claim 16 further requires particular bacteria and claim 17 various micronutrients and claim 18 particular amounts of ingredients. Molin discloses a health drink that contains lactobacilli bacteria. The reference does not disclose the claimed particular bacteria. However, it does say that the composition is good for racehorses, which have something in common with athletes in needing particular foods to enhance endurance when running (abstract and 2, lines 10-18). Nothing unobvious is seen in using particular lactobacilli bacteria absent a showing of unexpected results. Micronutrients as in claim 17 are disclosed on page 8. The particular amounts are seen as within the skill of the ordinary worker depending on the degree of fortification required. Therefore, it would have been obvious to use lactic acid producing bacteria and micronutrients in particular amounts in the composition of the combined references.

Claim 19 requires proteins and amino acids and claim 20 whey proteins.

Proteins are well known in sports drinks, hence, large containers using particularly whey proteins are seen at health food stores. Also, Kurppa discloses the use of the amino acid, glutamic acid in a sports drink (page 5, lines 7, in ex. 2). Therefore, it would have been obvious to use proteins and amino acids in the claimed beverage.

Claim 21 requires low glycemic type carbohydrates and optionally high glycemic index carbohydrates. This covers all carbohydrates. It would have been within the skill of the ordinary worker to use either one as the function of each type of carbohydrates in providing quick energy or long-term energy is well known. Therefore, it would have been obvious to use known types of carbohydrates in the claimed composition.

The limitations of claims 26-29 and 32 have been discussed above and are obvious for those reasons.

Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims and further in view of Masuyama (WO98/05343).

Claim 24 further requires the use of freeze dried lactobacilli with micronutrients in tablet form. Masuyama (WO98/05343) discloses that it is known to lyophilize (freeze-dry) lactobacillus and to form it into tablets (page 9, lines 10-14). Therefore, it would have been obvious to treat lactobacilli as claimed in the composition of the combined references.

***Allowable Subject Matter***

Claims 22, 23, 30, 31 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

### **ARGUMENTS**

Applicant's arguments with respect to claims 1-33 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 11-13-03

  
**HELEN PRATT**  
**PRIMARY EXAMINER**